SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-574 and 75-633

TOPSY'S INTERNATIONAL, INC., et al.,
Petitioners,

and

TOUCHE ROSS & CO.,
Petitioner,

vs.

ROBERT SEIFFER, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

The order of the Court of Appeals for the Tenth Circuit dismissing Petitioners' appeal, pursuant to 28 U.S.C. §1291, from a class certification order was required by well settled legal principles established by this Court and consistent with all Circuit Court decisions concerning the same issue. Therefore, Respondents respectfully pray that the Petitions for a Writ of Certiorari be denied.

QUESTION PRESENTED

Is the interlocutory class certification order of the District Court appealable under 28 U.S.C. §1291 where (a) the District Court's order may be altered or amended before a decision on the merits, (b) the ruling challenged by Petitioners was neither collateral to nor separable from the merits, and (c) the order can be fully reviewed after final judgment?

STATEMENT OF THE CASE

Nine plaintiffs, with aggregate claims of $200,000, bring this class action against Topsy's International, Inc. ("Topsy's") and its principal officers, former accountants and attorneys and certain investment banking firms. The Complaint alleges violations of the anti-fraud provisions of the Federal Securities Laws[1] based primarily on omissions of material facts about SaxonS Sandwich Shoppes, Inc. ("SaxonS"), which was acquired by Topsy's in August, 1968. Included in the class are purchasers of Topsy's Class A Common Stock from September 28, 1968, when all stockholders of Topsy's received the first official notice of the SaxonS acquisition, to March 10, 1970, when Topsy's notified its stockholders that the SaxonS operations would be substantially curtailed, and purchasers of $6,000,000 of Topsy's Convertible Subordinated Debentures from February 4, 1969, when they were first sold to the public, until March 10, 1970.

The contentions of Touche Ross & Co. ("Touche") seriously misstate its involvement in the alleged violations. Its conduct is not limited to the audit of Topsy's as of August 2, 1969. Touche did, in fact, express an opinion on financial statements as of August 31, 1968 appearing in both the preliminary prospectus of October 29, 1968 and the final prospectus of February 4, 1969 which contained a footnote incorporating by reference the textual material describing SaxonS. The material omissions in that textual material are the principal grounds for Respondents' Complaint. In addition, there is ample deposition testimony that Touche personnel were active participants in the prep-

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1. The Complaint alleges violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a), and Rule 10b-5, 17 C.F.R. §10b-5, promulgated under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b).

aration of the disputed textual material and were required by that firm's policy guidelines to review the entire prospectus for accuracy before consenting to the inclusion of an opinion in the prospectus. Touche had completed by September 11, 1968 all its field work for an audit of SaxonS as of August 31, 1968. The work papers of Touche leave no doubt that its personnel had actual knowledge of the omitted material facts.

In addition to the Petitioners, twenty-two investment banking firms ("Underwriters") and the former attorneys for Topsy's ("Tucker, Charno") are named defendants. While the order of the District Court certifying the class applied to all parties, only the Petitioners appealed the determination to the Court of Appeals. The District Court certified its decision under 28 U.S.C. §1292(b). Petitioners' motions for appeal under that provision were denied, as were their petitions for rehearing en banc. Petitioners also filed appeals under 28 U.S.C. §1291.

Petitioners Topsy's, et al. and Respondents have entered into a settlement agreement. If the agreement is approved by the District Court, counsel for Petitioners Topsy's, et al. has stated that his clients will withdraw from the proceedings in this Court even if Certiorari is granted. Settlements have also been reached with most of the Underwriters and a third-party defendant.

Pursuant to the District Court's Order of November 10, 1975, Notice of Class Determination and Hearing to Approve Proposed Partial Settlements of Class Action has been sent to all known members of the class. The notice included claim forms and exclusion request forms which are to be filed on or before January 19, 1976. Published notice is scheduled to appear in the National Edition of The Wall Street Journal, Kansas City Times, Kansas City

Star, St. Louis Post Dispatch, and St. Louis Globe Democrat during the week of December 1, 1975. A settlement hearing is scheduled for February 17, 1976. Respondents are bearing all notice costs.

REASONS FOR DENYING THE WRIT

I.

The Court of Appeals Properly Found That the Class Action Order Was Not Final and That the District Court's Ruling Challenged by Petitioners Was Not Collateral to Final Adjudication on the Merits.

The Court of Appeals did not err in dismissing the appeal by Petitioners from the District Court's class action order. It was not a "final order" within the meaning of §1291. The Tenth Circuit followed established and compelling precedent in concluding that the District Court's conclusions were not collateral to the final adjudication of the issues, but were an integral part of the cause of action requiring consideration with it.

The District Court's order falls squarely within the category of tentative or inconclusive rulings described in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The text of Fed. R. Civ. P. 23(c)(1) makes this clear by providing that the class action determination "may be . . . altered or amended before the decision on the merits." In addition, the Advisory Committee's Note to Rule 23(c)(1) states that a class action order may be changed "if, upon fuller development of the facts, the original determination appears unsound." See also, 7A Wright & Miller, Federal Practice and Procedure, §1785, at 137-139. The Rule, therefore, contemplates a continuing re-

appraisal of the propriety of using the class action procedure as the case continues to mature and move toward a trial on the merits. Thus, there is ample opportunity for the District Court to re-examine the Petitioners' various contentions as to why this case does not meet the procedural requirements for class action treatment even after trial commences.

The recent decision of this Court in *Eisen* v. *Carlisle and Jacquelin*, 417 U.S. 156 (1974) ("*Eisen IV*") delineated the limited circumstances in which a class action order might be appealable under §1291. *Eisen IV* determined that the Court of Appeals had jurisdiction to review the District Court's notice order under the rationale of *Cohen*. However, review was authorized *not* of the lower court's order granting class action status, but of its "collateral order" regarding payment for the notice. This Court, in *Eisen IV*, stated:

> "Restricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." 417 U.S. at 170.

The *Cohen-Eisen* collateral order doctrine is wholly inapplicable to the present situation. In this action, there is no difficulty regarding notice under Rule 23(c)(2). It is being given at Respondents' expense.

Petitioners attempt to disguise their position by asserting an amorphous and premature argument that the District Court's order somehow modified substantive law by denying Petitioners their right to trial by jury. In the unanimous opinion of the Tenth Circuit, Judge Murrah disposed of that argument as follows:

> "The objective standard for proving plaintiffs' due diligence was necessarily established by the order; and proof of due diligence is an integral part of the cause of action, whether brought individually or as a class, because it involves both the right to bring the suit under the statute of limitations and the ultimate right to recover under the securities laws . . . . *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153-154 (1972)."[2]

In essence, all Petitioners contend that the District Court improperly concluded that a "reasonable investor" standard was required in this action to establish the due diligence of class members in discovering the alleged fraud. The objective standard of measuring due diligence was established by the Tenth Circuit in a non-class action case. *Mitchell* v. *Texas Gulf Sulphur Company*, 446 F.2d 90 (10th Cir. 1971). There was no modification of substantive law by the District Court. The common legal principle applicable to the common facts is whether a *reasonable person*, after reviewing all public information, had become "fully aware that he or she had been victimized." *Dzenits* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 172 (10th Cir. 1974). The reasonable investor standard is well recognized and particularly appropriate in a class action. Application of such a standard in no way infringes any of Petitioners' substantive rights.

Concluding properly that the District Court's order was neither "final" nor "collateral and separable from the merits," the Tenth Circuit properly dismissed Petitioners' appeal.

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2. Topsy's Petition, p. 41. The opinion is contained in Appendix E of both Petitions and is now reported at 520 F.2d 795 (10th Cir. 1975).

II.

All Circuits Would Have Dismissed the Appeal and No Conflict Exists Applicable to This Case.

Petitioners have attempted to describe "conflicts" among the Circuits relating to the appealability under §1291 of class action grants. Topsy's et al. contend that the Tenth Circuit's ruling in this case conflicts with applicable decisions in the Second Circuit (Topsy's Petition, pp. 17-21). However, their Petition completely ignores the most recent pronouncements by that Circuit on the issue, *Handwerger* v. *Ginsberg*, 519 F.2d 1339 (2nd Cir. 1975), and *Parkinson* v. *April Industries, Inc.*, C.C.H.Fed. Sec.L.Rptr. ¶95,227 (2nd Cir. 6/30/75). Indeed, the *Parkinson* Court raised serious questions about the precedential validity of *Herbst* v. *International Telephone and Telegraph Corp.*, 495 F.2d 1308 (1974).[3]

The post-*Eisen IV* position of the Second Circuit is clearly expressed in *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2nd Cir. 1974); *Kohn* v. *Royall, Koegel & Wells*, 496 F.2d 1094 (2nd Cir. 1974); *Parkinson*, supra; and *Handwerger*, supra. Under the holdings in those cases, it is obvious that the Tenth Circuit has applied the three-pronged test in the same manner. If this case had been decided by the Second Circuit, the result would have been precisely the same.

Touche takes a different approach and raises a supposed conflict between the Ninth Circuit and the Second Circuit, citing *Blackie* v. *Barrack*, C.C.H.Fed. Sec.L. Rptr. ¶95,312 (9th Cir. 9/25/75). (Touche Petition, p. A27). However, their argument has no bearing in this

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3. See C.C.H.Fed. Sec.L.Rptr. at pp. 98,194-5, n.6 and p. 98,196, n.9.

case since the Ninth Circuit would also have denied Petitioners' appeal. The type of conflict referred to in Rule 19 of the Supreme Court Rules does not exist in this case and a Writ of Certiorari should not be granted.

With the sole exception of *Herbst*, all Circuits have consistently denied appeals under §1291 from orders granting or denying class certification. *Handwerger* v. *Ginsberg*, supra; *Parkinson* v. *April Industries, Inc.*, supra; *Kohn* v. *Royall, Koegel and Wells*, supra; *General Motors Corp.* v. *City of New York*, supra; *Rodgers* v. *United States Steel Corp.*, 508 F.2d 152 (3rd Cir. 1975); *Walsh* v. *City of Detroit*, 412 F.2d 226 (6th Cir. 1969); *Thill Securities Corp.* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972); *White Industries, Inc.* v. *Cessna Aircraft Co.*, 518 F.2d 213 (8th Cir. 1975); *Blackie* v. *Barrack*, supra; *Williams* v. *Mumford*, 511 F.2d 363 (D.C.Cir. 1975).

Petitioners' position is unsupported by any reported decision. Indeed, on November 11, 1975 this Court denied a Writ of Certiorari in a case involving the same question of appealability under §1291 presented by Petitioners, *White Industries, Inc.* v. *Cessna Aircraft Co.*, supra. This Court's recent decision in *Eisen IV* has given ample guidance to the Courts of Appeal, and no issues are presented in this case which command further elaboration.

III.

This Case Has Proceeded Too Far As a Class Action to Warrant Interlocutory Review of the Class Certification, Particularly Since It Will Proceed As a Class Action Against Non-Petitioning Defendants and Petitioners Can Seek Review After Judgment on the Merits.

An order granting or denying a class action is appealable under 28 U.S.C. §1291 *after* a final judgment on the merits of the class' claims. *Eisen IV; Esplin* v. *Hirschi*, 402 F.2d 94 (10th Cir. 1968). Thus, there is absolutely no justification for interrupting the orderly progression of this action in the District Court at this stage of the proceedings.

This action was filed November 11, 1971. Notice is being given to the class concerning the class certification and proposed settlements with Petitioners Topsy's, et al., eighteen Underwriters and a third-party defendant. Consummation of these settlements on behalf of the class is subject only to approval by the District Court. Extensive discovery has been conducted, and the District Court has stated that discovery will terminate April 15, 1976 and trial will commence later in that year. Regardless of the disposition of the instant Petitions for a Writ of Certiorari, the case will proceed as a class action against certain Underwriters and Tucker, Charno. It is impossible to conceive any rational justification for this Court to intervene now.

The applicable policy was articulated by this Court in *Cohen* v. *Beneficial Industrial Loan Corp.*:

> "Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal . . . Nor does the statute (§1291)

permit appeals, even from fully consummated decisions where they are but steps to final judgment in which they will merge." 337 U.S. 541, 546 (1949).

If the settlement with Topsy's, et al. is approved, its Petition becomes moot and will be withdrawn. If Touche prevails on the merits, the questions raised in its Petition likewise become moot. No irreparable harm to Petitioners can be demonstrated by delaying an appeal until a decision on the merits. This Court's time is far too valuable for the exercise in futility requested by Petitioners.

IV.

This Court Lacks Jurisdiction to Review the Class Certification Order.

It is axiomatic that lack of jurisdiction in the Tenth Circuit precludes review by certiorari herein. *Good Shot* v. *United States,* 179 U.S. 87 (1900). Accordingly, notwithstanding Petitioners' attempts to further delay the ultimate resolution by trial of this action, review by certiorari would not be proper.

CONCLUSION

Review of the class action order at this time is certainly inappropriate under the circumstances of this case. The underlying policies of the finality requirement in §1291 clearly weigh against granting the Petitions, particu-

larly where no conflict exists among the Circuits as to the result reached in the Court of Appeals below.

Dated: November 26, 1975

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